

## ARTICLE 89-03

### WATER APPROPRIATIONS

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#### CHAPTER 89-03-01 WATER PERMITS

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**89-03-01-01. Submission of application for conditional water permit.**  
Application for a conditional water permit must be submitted to the state engineer on the form provided by the state engineer. A map containing the information

prescribed by the state engineer must accompany the application. The map must be prepared from a survey, aerial photograph, or topographic map, and must be certified by a licensed surveyor unless another type of map is first approved by the state engineer. Application forms are available at the office of the state engineer in Bismarck. A fee schedule and instructions for completion of the form are enclosed with it. Information not requested in the application may nonetheless be required by the state engineer.

**History:** Amended effective April 1, 1989; February 1, 1994.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-03, 61-04-06(4)(f)

**89-03-01-01.1. Priority date.** The date of receipt by the state engineer of a properly completed application must be endorsed thereon. Except for water applied to domestic, livestock, or fish, wildlife, and other recreational uses where a water permit is not required, this date of filing establishes the original priority date of an application, subject to final acceptance of the application and issuance of a perfected water permit by the state engineer. For water applied to domestic, livestock, or fish, wildlife, and other recreational uses, where a water permit is not required, the priority date is the date the quantity of water was first used.

**History:** Effective April 1, 1989; amended effective August 1, 1994.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-04, 61-04-06.3

**89-03-01-01.2. Land, property, or other interest requirement for conditional water permit.** An applicant for a conditional water permit must have an interest or intent and ability to acquire an interest in the land on which the point of diversion and conveyance system will be located or must demonstrate to the satisfaction of the state engineer that the applicant has the capability to put the water to beneficial use. If the applicant is seeking a permit for irrigation, the applicant must also have an interest or intent and ability to acquire an interest in the land to be irrigated. If the applicant is seeking a permit to impound water, the applicant must have an interest or intent and ability to acquire an interest in the land or other property inundated by the impounded water. The state engineer may require the applicant to submit evidence of such an interest. At any time the state engineer may require additional verification of land or property interest or other interest demonstrating the capability to put the water to beneficial use.

**History:** Effective April 1, 1989; amended effective August 1, 1994; April 1, 2004.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-03

**89-03-01-01.3. When a water permit for stored water may be obtained.** A water permit for stored water may be obtained when the stored water will be put to a beneficial use. A water permit may also authorize the storage of water for flood control or other reasons deemed necessary by the state engineer. However,

authorization to store water for flood control or other reasons does not create a water right.

**History:** Effective November 1, 1989; amended effective August 1, 1994.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-01.1, 61-04-01.2, 61-04-02

**89-03-01-01.4. Amount of water that may be held in storage pursuant to a water permit.** Unless otherwise authorized by the state engineer, any person authorized to store water for a nonconsumptive beneficial use, a consumptive beneficial use, or other reasons, except flood control, may only fill the reservoir to the amount authorized in the permit once each year. The reservoir will be filled during the first runoff following February first of each year. A consumptive use authorized in the water permit must be taken from the stored water. Unless otherwise authorized by the state engineer and with the exception of water stored for flood control, any inflows to the reservoir after the reservoir has been filled for the year must be allowed to pass through the reservoir and downstream.

**History:** Effective November 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-01.2, 61-04-02

**89-03-01-01.5. Sale of excess water by an incorporated municipality or rural water system.** Any incorporated municipality or rural water system that appropriates water in excess of its current needs pursuant to North Dakota Century Code section 61-04-06.2 may sell the excess water provided:

1. The municipality or rural water system is supplying all the demands of its inhabitants or members;
2. The agreement for sale of water is terminable by the incorporated municipality or rural water system upon six months' notice to the purchasing entity; and
3. The agreement for sale is approved by the state engineer.

This section does not apply to agreements for the sale of water entered into prior to November 1, 1989.

**History:** Effective November 1, 1989; amended effective June 1, 1998.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-06.2, 61-02-27

**89-03-01-02. Correction of unsatisfactory application.** If an unsatisfactory application is refiled within sixty days from the date the request for

corrections is mailed, and if it meets the required corrections and is accepted, it shall take the priority date of its original filing.

**History:** Amended effective April 1, 1989; August 1, 1994.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-04

### **89-03-01-03. Amendment of application.**

1. An applicant may amend an application. If the state engineer determines the amendment is likely to adversely affect another applicant whose application was submitted after the application sought to be amended and before the proposed amendment, the state engineer shall change the priority date of the amended application to the date the request for the amendment was received.
2. A request to amend an application may be by letter or by the submission of an amended application form for a conditional water permit.
3. If, prior to the request to amend, any notices of the water permit application have been mailed, the applicant shall mail corrected notices and submit an affidavit of service of corrected notice to the state engineer. If the notice of the water permit application has been published, the state engineer shall publish a corrected notice. The state engineer may determine that corrected notices need not be mailed or published if the state engineer determines the amendment is insubstantial. Costs of publication must be paid by the applicant.

**History:** Amended effective April 1, 1989; April 1, 2000.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-04

**89-03-01-03.1. Transfer of an application to another parcel.** Requests by the applicant to transfer an application for a water permit to another parcel of land owned or leased by the applicant must be submitted to the state engineer on the form provided by the state engineer.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-03, 61-04-04, 61-04-15

**89-03-01-03.2. Assignment of an application to another person.** Requests for the assignment of an application for a water permit to another person must be submitted to the state engineer in writing. When title of land for which there is a pending application is transferred, either the transferee or the applicant may apply for assignment of the application. The application must describe the

transferee's interest in the application for a water permit. The state engineer may request additional documentation of the transferee's interest.

**History:** Effective April 1, 1989; amended effective April 1, 2000.

**General Authority:** NDCC 28-32-03, 61-03-13

**Law Implemented:** NDCC 61-04-03, 61-04-04

**89-03-01-03.3. Evaporative losses.** When an application involves water stored in a reservoir, a volume of water equal to the mean net evaporative loss over the surface area of the impoundment at the principal spillway elevation must be requested as an annual use which will come out of the stored water.

**History:** Effective April 1, 1989; amended effective August 1, 1994.

**General Authority:** NDCC 28-32-03, 61-03-13

**Law Implemented:** NDCC 61-04-03, 61-04-06.2

**89-03-01-04. Notice of application.**

1. When a proper application is filed, the state engineer shall forward the appropriate number of completed notice of application forms to the applicant. The notice must include the following essential facts: the places and use of appropriation, the amount of and purpose for which the water is to be used, the applicant's name and address, and the newspaper in which the notice of the water permit application will be published. The notice must also state that the notice published in the newspaper will contain a date by which any person having an interest in the application may file written comments regarding the proposed appropriation with the state engineer and that anyone who files written comments will be mailed a copy of the state engineer's recommended decision on the application.
2. Upon receipt of the completed notice forms, the applicant shall send a notice of application by certified mail to the following:
  - a. To the governing body of each city located wholly or in part within a one-mile [1.6-kilometer] radius of the proposed point of diversion.
  - b. To the governing body of the township or other governing authority of each rural subdivision located wholly or in part within a one-mile [1.6-kilometer] radius of the proposed point of diversion. A rural subdivision is a subdivision which has lots of ten acres [4.05 hectares] or less and is geographically located outside of a city.
  - c. To the governing body of the township or other governing authority for each rural tract of land which is owned by more than ten individuals and is located wholly or in part within a one-mile [1.6-kilometer] radius of the proposed point of diversion.

- d. Except for record title owners whose land falls within subdivision a, b, or c, each record title owner of real estate within a one-mile [1.6-kilometer] radius of the proposed point of diversion. The determination of title owners must be based on title records on file with the register of deeds of the appropriate county. For land subject to a contract for deed, the contract's grantor and grantee must both be notified.
  - e. To each person holding a water permit for the appropriation of water from an appropriation site located within a radius of one mile [1.61 kilometers] of the location of the proposed water appropriation site. The state engineer shall provide the applicant a list of all persons who must be notified under this subdivision.
  - f. To each municipal or public use water facility within a twelve-mile [19.31-kilometer] radius of the proposed water appropriation site is located. The state engineer shall provide the applicant a list of all municipal or public use water facilities that must be notified under this subdivision.
3. After notice of application has been mailed to those required by this section, the applicant shall properly complete an affidavit of notice and return it to the state engineer by certified mail. The affidavit of notice must state how the applicant determined the record title owners and must list the names and addresses of those who were sent notices by certified mail. This affidavit must be mailed to the state engineer within sixty days from the date the state engineer sent the notices of application to the applicant. If a properly completed affidavit of notice is not submitted within sixty days, the priority date of the conditional water permit application will be amended to the date on which the state engineer receives the affidavit of notice. If a properly completed affidavit of notice is not submitted within one hundred twenty days, the application must be considered to have been withdrawn by the applicant.

**History:** Amended effective April 1, 1989; November 1, 1989; February 1, 1994; April 1, 2000; April 1, 2004.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-05

#### **89-03-01-05. Publication of notice of water permit applications.**

1. Upon receipt of an applicant's properly completed affidavit of notice by certified mail, the state engineer shall publish a notice of the water permit application.
2. The state engineer shall provide a notice of the water permit application to the official newspaper of the county in which the proposed point of diversion is located and instruct the newspaper to publish the notice

once a week for two consecutive weeks. The notice must specify a date by which any person having an interest in the application may submit written comments to the state engineer and must state that anyone who files written comments with the state engineer will be mailed a copy of the state engineer's recommended decision on the application.

3. A copy of the notice of the water permit application must be sent to the applicant.
4. The applicant shall pay costs of publication.

**History:** Amended effective April 1, 1989; November 1, 1989; February 1, 1994; August 1, 1994; April 1, 2000.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 28-32-05, 61-04-05

**89-03-01-05.1. Notice of decision on water permit application.** Repealed effective April 1, 2000.

**89-03-01-06. Filing proof of publication and mailing.** Repealed effective April 1, 1989.

**89-03-01-06.1. Consideration of evidence not contained in the state engineer's record.** Repealed effective April 1, 2000.

**89-03-01-06.2. Notice of continuance - Responsibility.** If any party to a water permit hearing requests and receives a continuance of a water permit hearing, that party shall serve notice of the continuance upon any person who was served with notice of the original hearing. Service of notice of the continuance must be made in the manner allowed for service under the North Dakota Rules of Civil Procedure. The cost of the notice must be borne by the party requesting the continuance.

**History:** Effective April 1, 1989; amended effective April 1, 2000.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-04, 61-04-05.1

**89-03-01-06.3. Record - Official notice.** Unless specifically excluded by the state engineer or the hearing officer, the record in each water permit application proceeding includes, when available, the following reports or records, or portions thereof, relevant to the proposed appropriation:

1. United States department of agriculture natural resources conservation service reports including the North Dakota hydrology manual, North Dakota irrigation guide, and county soil survey reports.
2. United States geological survey and state water commission streamflow records.

3. United States geological survey and state water commission water quality data.
4. National oceanic and atmospheric administration climatological data.
5. United States geological survey topographic maps.
6. State water commission water permit files.
7. State water commission annual water use reports.
8. State water commission and United States geological survey ground water level data.
9. North Dakota board of water well contractors well completion reports.
10. State water commission test hole records.
11. State water commission water resource investigations reports and ground water study reports.
12. State water commission and United States geological survey county ground water study reports.
13. Information in state water commission files and records and other published reports.

**History:** Effective February 1, 1994; amended effective April 1, 2000.

**General Authority:** NDCC 28-32-06

**Law Implemented:** NDCC 28-32-06

**89-03-01-07. Necessity of works and construction of works for a conditional water permit.** A permit application may only be considered if works are associated with the proposed appropriation. For any water appropriation that involves the construction of the kind of works that require a construction permit from the state engineer, the water permit may be issued prior to receipt of the construction permit. However, if this is done, the water permit is not valid and has no effect until the construction permit is issued.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-02

**89-03-01-08. Point of diversion.** Application may not be made for and the state engineer may not issue a water permit that allows for the appropriation of water from more than one water source. An appropriation from the main channel of a river and from a tributary of the river is an example of an appropriation from more than one water source. The state engineer may issue a water permit that allows



for points of diversion from different locations on the same water source, provided the state engineer finds good cause for doing so.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-02-14

**Law Implemented:** NDCC 61-04-06.2

**89-03-01-09. Appropriation not requiring water permit.** Applications for appropriations of water for which a water permit is not required may be obtained from the state engineer to clearly establish a priority date. A fee schedule and instructions for completion are attached to the form.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-02

**89-03-01-10. Emergency or temporary authorization.** Application for a temporary appropriation must be made on the form provided by the state engineer. In that request the applicant must indicate the reason for the permit, quantity of water needed, proposed point of diversion, type of use, place of use, rate of withdrawal, source of water, dates of proposed use, and applicant's address. The state engineer will evaluate the request and, if it is granted, the state engineer will list on the temporary authorization conditions that govern the appropriation.

An applicant for emergency use of water, if the situation warrants, may telephone the office of the state engineer requesting immediate use of water. Following an oral request and oral approval by the state engineer for authorization, the above procedures must be completed.

The applicant for temporary or emergency appropriations is responsible for all damages that may be caused to other appropriators and any other individual as a result of an emergency or temporary use of water.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-02.1

**89-03-01-10.1. Temporary water transfer for irrigation.** To accommodate annual crop rotation requirements, the holder of a water permit for irrigation may make a request to the state engineer for the temporary transfer of the volume of water appropriated from an approved point of diversion to another tract of land. The transfer must be made for an entire irrigation season and conform to the terms and conditions of the water permit, except that no water right will accrue to the land under temporary irrigation. Irrigation may not take place on the tract of land from

which the transfer is made during that irrigation season. The request for a transfer must be made by May fifteenth of the year the transfer is to be in effect.

**History:** Effective August 1, 1994.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-02.1

**89-03-01-11. Competing applications.** Applications for conditional water permits from the same source for different uses will be considered competing applications if received by the state engineer within ninety days of each other.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-06.1

**89-03-01-12. Extensions and cancellation.** Where the time has expired to put all or any portion of the water of a conditional water permit to the beneficial use named in the permit, the state engineer will notify the permittee of this fact. The state engineer will provide the permittee with a form upon which the permittee may request an extension for applying the water to the beneficial use and to explain why an extension should be granted. Except in overriding circumstances no extension will be granted when other conditional water permit applications are pending from a limited source of supply.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-14

**89-03-01-13. Report of water usage.** The form for reporting water usage pursuant to North Dakota Century Code section 61-04-27 must include the permit number, name of water source, amount of water usage, pumping rate, and such other information as the state engineer shall require. One form must be filed for each water permit held within the timeframe set by North Dakota Century Code section 61-04-27.

**History:** Effective April 1, 1989.

**General Authority:** NDCC 28-32-02, 61-03-13

**Law Implemented:** NDCC 61-04-27

**89-03-01-14. Notice.** When a statute or rule requires the state engineer or water commission to serve an order personally or by certified mail, in circumstances requiring it, the order may be served by regular mail provided an affidavit of service by mail is filed indicating upon whom the order was served.

**History:** Effective February 1, 1997.

**General Authority:** NDCC 28-32-02, 28-32-13

**Law Implemented:** NDCC 28-32-13